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COURT OF CRIMINAL APPEALS
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NO. PD-0712-20

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

NELSON GARCIA DIAZ
Appellant
v.
THE STATE OF TEXAS
Appellee

No. 14-17-00685-CR
In the Fourteenth District Court of Appeals

No. 1555099
In the 228th District Court of Harris County, Texas
Hon. Belinda Hill, Judge Presiding

BRIEF FOR APPELLANT

ORAL ARGUMENT NOT PERMITTED

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STATEMENT OF THE CASE

Appellant was charged with several different offenses emanating from the home invasion of a Houston Police Department officer on September 26, 2013. Appellant was initially arrested and charged with Felon in Possession of a Weapon on October 1, 2013 and an additional charge of Aggravated Robbery was filed on February 11, 2014. Def. Ex. 1 at 3; Def. Ex. 2 at 3. Ultimately, the State tried Appellant for Burglary of a Habitation with Intent to Commit Aggravated Assault based on an indictment that was returned on June 13, 2017. CR 6. Appellant pleaded not guilty before a jury, but was found guilty as charged on August 14, 2017. 11 RR 75; CR 129. The same jury, after finding two enhancement paragraphs true, assessed punishment at 32 years confinement in the Texas Department of Criminal Justice. CR 137. Appellant gave timely notice of his intent to appeal and the trial court's certification of Appellant's right of appeal certifies Appellant has the right to appeal. CR 145, 147. Appellant's brief was timely filed on February 7, 2019 and the court affirmed the trial court's decision with one dissenting opinion on July 16, 2020. A petition for discretionary review was timely filed on August 6, 2020 and was granted on October 21, 2020. Having been granted an extension until December 7, 2020, Appellant's brief is timely filed.

STATEMENT REGARDING ORAL ARGUMENT

This Honorable Court has not permitted oral argument in this case. *In re Diaz*, PD-0712-20, 2020 Tex. Crim. App. LEXIS 808 (Tex. Crim. App. October 21, 2020).

ISSUE GRANTED

Does intentionally misdescribing an untested confidential informant as an "anonymous source" in a probable cause affidavit cause the informant's uncorroborated incriminating information to be excised pursuant to *Franks*?

STATEMENT OF FACTS

At approximately 10:00pm on September 26, 2013, Troy Dupuy, an officer with the Houston Police Department, was at home and about to go to sleep when he heard two men breaking down his front door. 6 RR 30, 35. According to Dupuy, the men entered yelling "police" and Dupuy, skeptical about their status, went to confront them armed with his pistol. 6 RR 46-47. Upon determining the men were not police officers, Dupuy began shooting and one of the intruders returned fire, wounding Dupuy in the leg. 6 RR 53, 58. The men then hastily fled Dupuy's house after inadvertently dropping a pair of sunglasses and a battery and plastic backing from a cell phone. 6 RR 72-73.

The incident drew intense media scrutiny and, within a few days, a Drug Enforcement Agency confidential informant who had seen a report on TV told DEA agents that Appellant was involved in the incident. 7 RR 76; 10 RR 221. According to the informant, Appellant had intended to rob a drug dealer but went to the wrong house and ended up shooting a man inside. 7 RR 83-84.

As two DEA agents testified at Appellant's trial, they relayed their informant's information to the lead detective on the case, Harris County Sheriff's Office Deputy D. A. Angstadt. 10 RR 223-24. Angstadt, however, was initially skeptical of the DEA agents and only became interested when the agents described crime scene details not publicly known about the cell phone battery that had been left at the scene. 2 RR 19-20. After establishing the legitimacy of their informant's claims, the DEA agents and Angstadt discussed the informant's compensation. 3 RR 19. The DEA agents wanted their informant to be paid for his assistance but could not provide compensation for information pertaining to non-DEA investigations—like the Dupuy home invasion. *Id*. Angstadt, likewise, had no way to provide a direct payment for the informant's help. *Id*. As a result, Angstadt suggested the DEA agents have their informant call Angstadt, routing the call through the Crime Stoppers organization in order to seek Crime Stoppers reward money. *Id*. Although "a little shocked" by the suggestion of defrauding Crime Stoppers, the DEA agents agreed and had their informant follow Angstadt's instructions. *Id*. Throughout Appellant's trial, presumably in order to conceal the Crime Stoppers deception, Angstadt claimed he never knew the source was a paid DEA informant. CR 61, 68; 2 RR 44. Further, Angstadt maintained that he had sought out the DEA's involvement, and not the other way around. *Id*. Despite DEA agent testimony to the contrary, according to Angstadt, his "training and experience" led him to contact the DEA and

it was simply a coincidence that the "anonymous" source turned out to be a paid DEA confidential informant working under the very same DEA agents he contacted. *Id*.

In any event, based on the DEA and the DEA informant's information, the Gulf Coast Violent Offenders Task Force, a "multi-jurisdictional" law enforcement agency, set up surveillance at an apartment complex in Harris County where Appellant was believed to be staying and officers watched as Appellant left the complex in the backseat of a vehicle. 8 RR 137-40. The vehicle was monitored as it turned into a nearby grocery store parking lot. 8 RR 158. Authorities then descended on it, arrested Appellant, and detained the vehicle's other three occupants. 8 RR 164-65. Three cell phones were found on Appellant's person. CR 62. Two other cell phones were found within the vehicle, and a computer and a broken cell phone, missing its battery and backing, were found within the apartment Appellant had just left. CR 68.

All of the above-described electronic devices were recovered at the time of Appellant's arrest on September 30, 2013. CR 62, 68. But authorities did not seek to search any of the devices until almost four years later. *Id*. On June 16, 2017, police obtained two separate warrants --supported by affidavits with nearly identical verbiage-- to search each of the above described electronic devices except, for reasons that are not clear in the record, the broken cell phone with the missing battery

and backing. *Id*. The first of the two warrants authorized the search of the three cell phones found on Appellant's person. CR 61-63. The second warrant authorized the search of the other cell phones found in the vehicle where Appellant was arrested, as well as the computer recovered from the apartment Appellant had recently left. CR 67-70. Consistent with Angstadt's testimony at Appellant's trial, Angstadt's information in the warrant affidavit wrongly described the DEA informant as an "anonymous" source. CR 61, 68; 2 RR 43.

The supporting affidavits for both warrants were signed by Harris County District Attorney Investigator T. Pham, who averred he had communicated with the investigating detective, D. A. Angstadt. CR 61-63, 67-70. The relevant portions of each affidavit read as follows:

> On September 30, 2013, Dep. D. A. Angstadt received an anonymous tip that an individual known as 'Jessie' was involved in the home invasion against the Complainant. The tipster provided two phone numbers for the suspect. Based on Dep. D. A. Angstadt's training and experience as a narcotic, robbery and homicide investigator, Dep. D. A. Angstadt knew persons who commit home invasions are commonly involved in the illegal narcotics trade. Dep. D. A. Angstadt spoke with DEA Special Agent Michael Layne and requested SA Layne run the phone numbers through DEA databases. Dep. D. A. Angstadt learned that one of the phone numbers belonged to Defendant Nelson Garcia Diaz.

CR 61, 68. The affidavit then requests authorization to search the electronic devices recovered at the time of Appellant's arrest for evidence that might relate to the Dupuy home invasion.

> Your (sic[1]) Dep. D. A. Angstadt has found through training and experience and also through regular human experience that the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily. Therefore, it is Dep. D. A. Angstadt's opinion that stored communication probably exists within the seized cellular phones and computer, and the contents of these communications are probably relevant and material to the offenses committed. It is also the opinion of Dep. D. A. Angstadt that the contents of any identified stored communications, whether they are opened or unopened or listened to or un-listened to, are probably relevant and material to the investigation. Dep. D. A. Angstadt has also found through training and experience that individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit.

CR 62, 69. On this basis, the Harris County District Attorney's Office Investigator sought to review every conceivable item within each of the described electronic devices.

> It is Deputy D. A. Angstadt's belief, based on my (sic) investigation, that there is probable cause to believe that Defendant may have communicated with other individuals before, during or after the commission of these offenses using his cellular phone or computer. Dep. D. A. Angstadt believes these electronic devices could contain valuable information such as photographs/videos; text or multimedia messages (SMS and MMS); any call history or call logs; any emails, instant messaging or other forms of communication of which said phone is capable; Internet browsing history; any stored Global Positioning System (GPS) data; contact information including email addresses, physical addresses, mailing addresses, and phone numbers; any voicemail messages contained on said phone; any recordings contained on said phone; any social media posts or messaging, and any images associated thereto, including but not limited to that on Facebook, Twitter, and Instagram; any documents and/or evidence

[1] The affidavit tracks erroneous boilerplate language occasionally suggesting Deputy Angstadt—and not Investigator Pham—was the affiant.

> showing the identity of ownership and identity of the users of said described item(s); *computer files or fragments of files* (emphasis added); all tracking data and way points; CD-ROM's CD's, DVD's, thumb drives, SD cards, flash drives or any other equipment attached or embedded in the above described device that can be used to store electronic data, metadata and temporary files.

Id.

The warrant that Appellant challenges on appeal authorized the search of the three cell phones found on Appellant's person. CR 60-63. Evidence from these electronic devices was admitted in the form of cell phone extracts and photographs in State's Exhibits 203, 204, 205 and 206. State's Exhibit 203, a cell phone extract, showed several communications with the paid informant's number and corroborated the informant's testimony that Appellant and the informant had discussed the home invasion over the phone. State's Ex. 203. State's Exhibit 204, an extract from another phone, contained a photograph of Appellant holding a fake law enforcement badge issued to a person named Jesse Carboni. State's Ex. 204. This photo corroborated testimony from the complainant who said the intruders had entered holding badges and claiming to be police. 6 RR 46-47. The same photo also corroborated testimony from the paid informant who said Appellant went by the name of "Jesse." 7 RR 79. State's Exhibit 204 also showed that a KHOU media article about the home invasion had been downloaded onto the phone. State's Ex. 204. State's Exhibit 205, an extract from the third phone found on Appellant's person, contained several email and social media accounts attached to a person named "Jesse Carboni." 10 RR 172.

Additionally, several photographs of Appellant with weapons were recovered. State's Ex. 205. Finally, State's Exhibit 206 included two videos taken from the phone extract in State's Exhibit 205. 10 RR 195-96. These videos showed Appellant: (1) wearing sunglasses that appeared to be the same as the sunglasses left at the crime scene, State's Ex. 50; (2) holding a phone that appeared similar to the phone that was ultimately separated from its battery and plastic backing, State's Ex. 52, 141; and (3) displaying and discussing a .380 pistol that was never recovered by police, but, based on shell casings found at the crime scene, would have been consistent with a weapon the assailants used in the home invasion. 10 RR 198-200.

Appellant filed a pre-trial motion to suppress the search of all of the electronic devices in Defendant's Exhibit 1 and 2 and the trial court denied Appellant's motion *in toto*. CR 53-69; 4 RR 27.

SUMMARY OF THE ARGUMENT

Appellant objects to the use of evidence recovered as a result of a search warrant for three cell phones found on Appellant's person. CR 60-63. At issue is the legitimacy of the affidavit that provided a basis for the warrant in question. The affidavit included intentionally false assertions by the investigating officer made to allow the informant to be improperly compensated. The affidavit incorrectly states the original source of the information implicating Appellant was "anonymous," when in fact the source was a paid DEA confidential informant whose identity was known to law enforcement. Further, the affidavit insinuates that the investigating officer-initiated contact with the DEA about this "anonymous source" when, in fact, it was the DEA that initiated contact with the investigating officer. Equally troubling, however, is the investigating officer's willingness to misstate his own "training and experience." In the search warrant affidavit, the investigating officer claimed he reached out to the DEA because, in the officer's "training and experience," narcotics cases and home invasion cases are often related. But the truth is that the officer's "training and experience" played no role in the DEA's involvement. Indeed, it was in spite of the investigating officer's initial skepticism that DEA agents were able to convince the officer of their informant's valuable information.

It was based on this dubious "training and experience" that the investigating officer obtained authority to search everything within each of the confiscated

electronic devices that could be considered either a "file" or a "fragment" of a file. Appellant contends the investigating officer intentionally or recklessly lessened his burden of production in the warrant affidavit by falsely referring to the informant as "anonymous." This misrepresentation allowed the officer to obtain a search warrant based on the informant's claims without offering any evidence of the informant's track record with the DEA. Further, Appellant contends the officer lied in the warrant affidavit about his "training and experience." Finally, the informant's tips were also uncorroborated by allegations within the four corners of the affidavit.

Therefore, Appellant asserts all portions of the affidavit referring to the informant's claims and all portions of the affidavit referring to the officer's "training and experience" must be excised from a four corners probable cause evaluation pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). With these portions removed from consideration, Appellant contends probable cause did not exist to search the phones found on Appellant's person and the recovered evidence from these phones that was admitted at Appellant's trial, State's Exhibits 203-206, should have been suppressed.

ARGUMENT

The evidence that was discovered based on the warrant issued should have been suppressed under *Franks v. Delaware*, 438 U.S. 154 (1978), due to the intentional misstatements Deputy Angstadt made on the accompanying affidavit: Both (1) the mischaracterization of the informant, and (2) the resulting deception regarding DEA involvement in the case.

The Warrant Clause of the Fourth Amendment protects citizens from unreasonable searches and seizures by requiring police to provide a preliminary showing of probable cause. *Id*. at 164. A trial court's determination of probable cause is restricted to the four corners of the search warrant affidavit. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). The supporting affidavit of an evidentiary search warrant must set forth facts sufficient to establish probable cause that (1) a specific offense has been committed, (2) the specifically described property or items that are to be the subject of the search or seizure constitute evidence of that offense, and (3) the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. TEX. CODE CRIM. PROC. art. 18.01(c), 18.02(a)(10).

According to Judge Frankel, quoted in *Franks*, "[When] the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." *Franks*, 438 U.S. at

164-65 (quoting *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966)) (emphasis in original). While every fact recited need not be ultimately correct, the warrant affidavit must be "truthful" in that "the information put forth is believed or appropriately accepted by the affiant as true." *Id*. at 165.

Under *Franks*, even evidence obtained pursuant to a warrant must be suppressed if (1) the defendant can establish by a preponderance of the evidence that the affidavit supporting the arrest contains a misstatement that the affiant made with "reckless disregard for the truth" and (2) excising the false statement, the affidavit's remaining content is insufficient to establish probable cause. *Id*. at 155-56. If the remaining content of the affidavit does not still establish sufficient probable cause, the search warrant must be voided and evidence resulting from that search excluded. *Id*. at 156; *Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007). If a defendant establishes the first prong of *Franks*, the reviewing court should no longer afford its usual deference to the magistrate because the trial court's judgment "would have been based on facts that are no longer on the table," and there is "no way of telling the extent to which the excised portion influenced" the trial court's determination. *State v. Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015) (quoting *United States v. Kelley*, 482 F.3d 1047, 1051 (9th Cir. 2007)).

Without this mechanism allowing defendants to challenge search warrants, the warrant requirement would be "reduced to a nullity if a police officer was able

to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Franks*, 438 U.S. at 168. The *Franks* test applies to all allegations in a warrant affidavit, not just the content of an informant's tip.

In *Janecka v. State*, 937 S.W.2d 456 (Tex. Crim. App. 1996), this Honorable Court recognized narrow exceptions for fabrications either with "no perceptible effect on the information necessary to establish probable cause," *id*. at 464, or "intended solely to obscure the identity of the informant for his or her protection." *Id*. at 463. In that case, this Honorable Court determined that a misrepresentation with regard only to how information was gained, "whether via conversation or via the affidavit," did not implicate *Franks* or offend the Fourth Amendment because the "substantive information was true." *Id*. at 465.

1. The mischaracterization of the informant was a material misrepresentation under *Franks* because it presented a more favorable burden of production for the affiant.

In this case, the affidavit included deceptive information from the investigating officer, intended to mislead the magistrate. The trial court, in its findings of fact and conclusions of law, found "not credible" one specific portion of Detective D. A. Angstadt's testimony: that he "does not recall if he received the anonymous tip before or after his telephone conversation with (DEA Agent) SA Layne and that he did not know about a DEA confidential informant." Trial Court

Findings of Fact #28. Based on this "not credible" testimony, the trial court found Angstadt made an incomplete and not completely accurate statement "…with reckless disregard for the truth." Trial Court Conclusions of Law #1. Specifically, the trial court found "Angstadt misled the magistrate in failing to disclose that the anonymous tipster was also the DEA confidential informant." Trial Court Conclusions of Law #2.

Citing *Janecka*, the trial court concluded that Angstadt's misidentification of the informant in the search warrant's supporting affidavit "was not material as it pertains to probable cause." Trial Court Conclusions of Law #2; *Janecka*, 937 S.W.2d at 463. On appeal, the majority continued to rely on *Janecka* for the proposition that misidentifying a known source as an unknown source solely to obscure the identity of the source *for the source's protection* is not the type of misrepresentation in a probable cause affidavit which offends the Fourth Amendment. *Diaz v. State*, 604 S.W.3d 595, 602 (Tex. App.—Houston [14th Dist.] 2020), *pet. granted*, *In re Diaz*, PD-0712-20, 2020 Tex. Crim. App. LEXIS 808 (Tex. Crim. App. Oct. 21, 2020); *Janecka*, 937 S.W.2d at 463. The majority, therefore, upheld the trial court's denial of Appellant's motion to suppress and affirmed Appellant's conviction. *Diaz*, 604 S.W.3d at 602-03.

The dissent, however, stated that the majority misapplied *Franks* and distinguished *Janecka* because, here, the misrepresentations in the search warrant

affidavit were not made to protect the informant's identity, but they did affect the affiant's burden of production to establish probable cause. *Id*. at 607 (Spain, J., dissenting). The dissent cited *State v. Duarte*, in which this Honorable Court held that a tip from a confidential informant is presumed unreliable until the affiant demonstrates a "track record" of accuracy or is sufficiently corroborated. 389 S.W.3d 349, 357 (Tex. Crim. App. 2012)). Furthermore, tips from *both* "anonymous" *and* "first-time confidential informants of unknown reliability" *must be* "coupled with facts from which an inference may be drawn that the informant is credible or that his information is reliable." *Id*.

Applying *Duarte* to this case, the dissent concluded that the affidavit offered no indication that the actual paid informant had any sort of reliable "track record" or that corroborating evidence existed in support of the paid informant's claims. *Diaz*, 604 S.W.3d at 608. Without anything to support the paid informant's credibility, the dissent would have held the affidavit lacked probable cause under the unrebutted presumption that paid informants and anonymous tipsters alike are unreliable. *Id*.; *see* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3(b). Under *Duarte*, all uncorroborated claims made by the paid informant—including the statement that "an individual known as 'Jesse' was involved in the home invasion"—should have been excised. *Diaz*, 604 S.W.3d at 608. Without inclusion of this information from the paid informant, the dissent found

the affidavit in this case failed to establish probable cause for the search and all of the evidence obtained as a result of the search should have been suppressed. *Id*.

2. Characterizing the fruit of DEA initiative in the case as the fruit of affiant's own "training and experience" in order to justify the affiant's initial mischaracterization of the informant was misleading to the magistrate and a material misrepresentation under *Franks*.

The deception found in the search warrant affidavits was even more extensive than the mere mischaracterization of the investigation's source as "anonymous." After misinforming the magistrate about the "anonymous" tipster, Angstadt built upon that lie and suggested it was the tipster's information that caused Angstadt to reach out to the Drug Enforcement Agency. CR 61, 68. According to Angstadt's statements in the warrant affidavit, Angstadt specifically contacted the DEA because in his "training and experience as a narcotic, robbery and homicide investigator" he knew "persons who commit home invasions are commonly involved in the illegal narcotics trade." *Id*. The deception here is subtle, yet significant. Angstadt could not avoid including information in the warrant affidavit about the DEA's involvement in the investigation because it was so extensive. But Angstadt did not want to identify his source as a known DEA informant for fear their coordinated fraud on the Crime Stoppers organization would come to light. As a result, Angstadt had to fabricate a reason why the DEA was involved in a non-federal, non-narcotic related investigation. To explain the DEA's involvement, Angstadt falsely claimed he had sought out the DEA when in fact it had been the DEA that contacted Angstadt.

But this lie led to another problem because Angstadt next had to explain why he sought help from the DEA—as opposed to any other law enforcement agency. To answer this question, Angstadt lied again and falsely claimed he sought out the DEA based on "training and experience" that narcotic crimes were often connected with home invasions. According to Angstadt's statements in the warrant affidavit, Angstadt knew, based on his "training and experience," that "persons who commit home invasions are commonly involved in the illegal narcotics trade" and the potential narcotics connection led Angstadt to believe the DEA might be able to assist. CR 61. But all of this was a subterfuge: Angstadt's "training and experience" played no role whatsoever in connecting him with the DEA. Indeed, according to DEA agent testimony, Angstadt was initially uninterested when they called him and the DEA agents had to convince him that their informant's information might be valid. 2 RR 19-20.

When a defendant establishes perjury or reckless disregard for the truth by a preponderance of the evidence, the false material is to be set aside. *Franks*, 438 U.S. at 156; *Harris*, 227 S.W.3d at 85. Furthermore, unlike *Janecka*, the motivation for the deception was not to protect a witness, but to protect a law enforcement officer from getting in trouble. *Franks* made clear that the policy rationale behind its holding was to prevent officers from "remain[ing] confident" that a ploy to mislead the

magistrate is "worthwhile." 438 U.S. at 168. As a result, the following portion of the warrant's supporting affidavit should be excised:

> On September 30, 2013, Dep D. A. Angstadt received an anonymous tip that an individual known as 'Jessie' was involved in the home invasion against the Complainant. The tipster provided two phone numbers for the suspect. Based on Dep. D.A. Angstadt's training and experience as a narcotic, robbery and homicide investigator, Dep D.A. Angstadt knew persons who commit home invasions are commonly involved in the illegal narcotics trade. Dep. D. A. Angstadt spoke to DEA Special Agent Michael Layne and requested SA Layne run the phone numbers through DEA data bases. Dep. D. A. Angstadt learned that one of the phone numbers belonged to Defendant Nelson Garcia Diaz.

CR 61.

The elimination of this language from the warrant affidavit would utterly obliterate the nexus between the Dupuy home invasion and the three cell phones recovered several days later on Appellant's person. At the very least, it would call into serious question the extent to which the excised portion influenced the magistrate's judgment. *See State v. Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015). Without the excised language, there is no connection between the "anonymous" tipster and Appellant and there is no indication that Appellant, prior to his arrest, had multiple phone numbers. Further, with the false information eliminated from the supporting affidavit, Appellant's only connection to the Dupuy home invasion would be his DNA on the sunglasses left at the scene. CR 62. In

essence, the remaining portion of the affidavit would fail to sufficiently connect both Appellant and the three cell phones on his person, making the warrant doubly illegitimate. *See Taunton v. State*, 465 S.W.3d 816, 824 (Tex. App.—Texarkana 2015, pet. ref'd) (holding the trial court erred in denying a motion to suppress where none of the allegations in the search warrant affidavit indicated how the appellant "was related to or associated with the murder victims or how he may have committed these specific murders").

The Court of Appeals majority opinion held that "the crucial information identifying appellant and appellant's involvement in the home invasion was essentially true and independently corroborated by Agent's Layne and Thompson" at the suppression hearing. *Diaz*, 604 S.W.3d at 602. But relying upon information because it was ultimately corroborated violates the four-corner doctrine. "Whether probable cause exists to support the issuance of a search warrant is determined from the 'four corners' of the affidavit alone." *Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996). As stated in the appellate court's dissent, "Later corroboration, however, does not cure deficiencies in the original affidavit." *Diaz*, 604 S.W.3d at 608 (citing *Whitely v. Warden*, 401 U.S. 560, 565 n.8 (1971)).

Therefore, Deputy Angstadt's mischaracterization of his informant's status and the resulting deception about how the subsequent investigation unfolded constitute material misrepresentations under *Franks*. Excising the paragraph

reproduced above, the remaining allegations in the affidavit fail to amount to probable cause to warrant a search of multiple, otherwise unconnected, phones. As a result, the decision of the Fourteenth Court of Appeals should be reversed by this Honorable Court.

PRAYER

Nelson Garcia Diaz, Appellant respectfully prays that this Honorable Court reverse the majority decision of the Fourteenth Court of Appeals and find the trial court erred in denying Appellant's motion to suppress. Appellant further prays this Honorable Court remand this cause to the Court of Appeals to conduct a harm analysis of the trial court error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2020, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rule of Appellate Procedure 9.5.

Additionally, I certify that on December 7, 2020, I provided this brief to the State Prosecuting Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rules of Appellate Procedure 68.11 and 70.3.

/s/NicoleDeBorde
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CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure, I certify that this brief contains 5,241 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The number of words permitted for this type of computer-generated brief (a brief in response in an appellate court) is 15,000.

/s/NicoleDeBorde
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